APPENDIX "A"

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 230 — October Term, 1943.

(Argued February 4, 1944—Decided July 25, 1944.)

UNITED STATES OF AMERICA,
as owner of Cable No. 555,
Libellant-Appellee,

against

Tug JOHN R. WILLIAMS and GREAT LAKES DREDGE & DOCK COMPANY,
Respondent-Claimant-Appellant.

Before:
L. HAND, AUGUSTUS N. HAND and FRANK,
Circuit Judges.

Appeal from the United States District Court for the Southern District of New York.

From a decree in admiralty which granted to the libellant, United States of America, a recovery of $2,559.83 from respondent-claimant and the Tug John. R. Williams,

the Great Lakes Dredge & Dock Company, respondent-claimant, appeals. Modified.

AUGUSTUS N. HAND, *Circuit Judge*:

The United States owned a submarine telephone cable designated as No. 555 extending across the Narrows at the entrance to New York Harbor and connecting Fort Wadsworth and Fort Hamilton. On the morning of August 22, 1938, the Tug John R. Williams, belonging to Great Lakes Dredge & Dock Company, was proceeding out through the Narrows to the dumping grounds with the loaded dump scow No. 54 in tow on a single steel hawser and bridle, the hawser being about 1¾ inches in diameter. The tug had out about 800 feet of hawser, and the bridle on the bow end of the scow was about 38 feet long. It was necessary for the tug to slow down in the Narrows in order that patrol boats operated by the War Department might come alongside and pick up permits required for dump scows and inspect the scow. On the morning of August 22 the tide was ebbing so that when the tug slowed down the headway of the dump scow No. 54 continued, causing the towing hawser to slacken and to drop under water. The Tug John R. Williams, after surrendering her permit and starting ahead at half speed, took a heavy list to port. This indicated to her master that her towing hawser was caught on something. He immediately slowed down his engine to about 1/3 speed and exerted strain on the hawser by means of the tug's steam towing machine in an unsuccessful effort to heave the hawser clear. When these efforts to heave the hawser clear

proved unavailing, its outer end was freed by cutting the bridle on the bow of the dumpscow. As the hawser was reeled it it was found badly cut for some 150 feet.

An alarm system was maintained at Fort Hamilton to give warning in the event the cable connecting that Fort with Fort Wadsworth should be damaged, and this alarm was under constant surveillance. On the morning of August 22, 1938, at 10:38 A. M., the alarm gave the signal that the cable was out of order. Lieut.-Colonel Barrows, stationed at the Fort, looked out over the area where the cable was laid and saw a tug and dumper-scow in tow which, according to the testimony of another witness, proved to be the Tug John R. Williams and her scow. This witness also testified that the dumper was coming on with the tide and that there were men on the deck of the tug trying to free the hawser. Later inspection of cable No. 555 indicated that it had been broken and that it looked "as if it had been subject to quite a strain just before parting". No part of it, however, came to the surface of the water at the time the tug was attempting to free the hawser.

Upon the evidence, which we have summarized, Judge Clancy entered an interlocutory decree in which he found that "in the absence of any other satisfactory explanation, we draw the conclusion of fact that the tug's wire rope was the agent which severed the libellant's cable". He also concluded that when the master of the tug recognized that the hawser was fouled, "running his boat for fifteen minutes at one-third speed and raising his hawser with the

towing machine within the cable area was a violation of his duty and constituted negligence which was the proximate cause of injury to libellant's cable". His conclusion was sound. When the tugmaster ascertained that his hawser had fouled on some object that must have rested on the bottom, it was negligent to go on pulling with might and main against that object for fifteen minutes, particularly in an area in which cables were known to lie. No vessel but his was near.

* * * * *

It appears from the foregoing that recovery was properly allowed against respondent, Great Lakes Dredge & Dock Company, on the merits of the litigation, but the suit was brought in admiralty and not only was Great Lakes Dredge & Dock Company made a party, but its Tug John R. Williams, in order to enforce a maritime lien. To the libel filed by the United States, the respondent and claimant raised the issue of lack of admiralty and maritime jurisdiction in the District Court. This plea was overruled by Judge Clancy, who sustained jurisdiction on the authority of *United States v. North German Lloyd,* 239 Fed. 587, and *Postal Telegraph Cable Co. v. P. Sanford Ross,* 221 Fed. 195. There have been similar decisions by district courts in both the Second and Third Circuits which have upheld admiralty jurisdiction with respect to damage done by vessels to submarine telephone and telegraph cables. *The Toledo,* 242 Fed. 168, (D. C. N. J.); *The Majestic,* 1932 AMC 1079, (S. D. N. Y.); *New York Telephone Co. v. Cities Service Transp. Co.,* 23 F. Supp. 426, (E. D. N. Y.); *Bell Telephone Co. v.*

United States, 1943 AMC 220, (E. D. N. Y.). But Judge Campbell declined to follow these decisions in *The Russell,* 42 F. Supp. 904, 907, (E. D. N. Y.), and two District Courts in the Fifth Circuit have held that courts of admiralty have no jurisdiction over suits for damage done by vessels to submarine telegraph cables. *The Mont Agel,* 1924 AMC 401, (E. D. La.); *Postal Telegraph Cable Co. v. Cananova,* 1942 AMC 481, (S. D. Fla.). The Circuit Court of Appeals of the Ninth Circuit (which is the only Court of Appeals that has considered a question almost exactly resembling the one before us) denied admiralty jurisdiction in suits for damage to submarine power cables. *Nippon Yusen Kabushika Kaisha v. Great Western Power Co.,* 17 F. (2d) 239, (C. C. A. 9), cert. denied 274 U. S. 745; *Westfall Larson and Co. v. Allman-Hubbell Tugboat Co.,* 73 F. (2d) 200, (C. C. A. 9); *Portland General Electric Co. v. United States,* 142 F. (2d) 552, (C. C. A. 9).

According to settled maritime law, if the cable had been in fault and injured the tug, a libel could have been maintained against the owner of the cable, and, as Justice Holmes said in *The Blackheath,* 195 U. S. 361, 365, "there seems to be no reason why the fact that the injured property was afloat should have more weight in determining the jurisdiction than the fact that the cause of the injury was." While the maritime jurisdiction of the United States may be defined and in some cases extended by Congress beyond prior decisions of the courts, there has been no legislation like that by the British Parliament allowing recovery in admiralty for injuries by ves-

sels afloat to structures on land, the use of which was not an aid to navigation. The farthest authoritative decisions have gone is to allow a suit in admiralty for injuries to beacons or clusters of piles, used for mooring vessels, where such beacons or piles, though affixed to the earth, are surrounded by water and are used as aids to navigation. *The Blackheath,* 195 U. S. 361, (damage by vessel to a beacon); *The Raithmoor,* 241 U. S. 166, (damage by vessel to a beacon in process of construction); *Doullut and Co. v. United States,* 268 U. S. 33, (cluster of piles driven in river bottom and surrounded by water). In the case at bar there is no evidence that the cable was to be used as an aid to navigation, even if that fact would have been sufficient to sustain admiralty jurisdiction. The last three decisions we have cited somewhat ameliorated the strict general rule precluding recovery for injuries where the thing damaged is connected with the earth or shore. An early decision of the Supreme Court illustrating the general rule is *The Plymouth,* 3 Wall. 20, where the owner of a warehouse and wharf was denied recovery in admiralty for damages suffered from fire that had started on a vessel moored to the wharf. The decision in *Ex parte Phoenix Ins. Co.,* 118 U. S. 610, was to the same effect. In *Johnson v. Chicago &c. Elevator Company,* 119 U. S. 388, jurisdiction in admiralty was denied where a building on land was damaged by the jibboom of a ship. In *Cleveland Terminal R. R. v. Steamship Co.,* 208 U. S. 316; *The Troy,* 208 U. S. 321, and *Martin v. West,* 222 U. S. 191, jurisdiction in admiralty was denied in suits to recover for injuries to drawbridges by vessels. Likewise in *The Panoil,* 266 U. S. 433, recovery in ad-

miralty was denied where a dike built out from the shore in order to deflect the current and deepen the channel, was injured by a vessel which negligently collided with it. Perhaps the case most nearly in point is *The Poughkeepsie,* 162 Fed. 494, affirmed in a *Per Curiam* opinion in 212 U. S. 558. There the Phoenix Construction Company had made certain pipe borings for the purpose of locating the site of an aqueduct to be built under the Hudson River in order to carry water from the Catskills to the City of New York. The boring was composed of various lengths of wrought iron pipe surrounded by a platform on the surface of the water. Respondent's steamer Poughkeepsie negligently collided with the platform and pipes with resulting damage. The bottom of the pipe was over 600 feet beneath the surface of the Hudson River, and at the point where it was situated was in about 50 feet of water. The structure was approximately 800 feet from the nearest point on the shore and was not connected with any structure attached to the land, nor was it itself attached to the land except as it was fixed to the bed of the river. The District Court for the Southern District of New York dismissed the libel filed by the Construction Company in order to recover damages to its equipment on the ground that the court lacked jurisdiction and the decision was affirmed by the Supreme Court on the authority of *Cleveland Terminal and Valley Railroad Company v. Cleveland Steamship Company,* 208 U. S. 316, and *The Troy,* 208 U. S. 321, both cases of injury to drawbridges.

In the case at bar the cable which lay at the bottom of the river was certainly no different in respect to admir-

alty jurisdiction from the equipment of the Construction Company in *The Poughkeepsie, supra.* Indeed, if a most technical view of the question were taken, the connection of the cable with the shore might make the libellant's case weaker than that of the libellant in *The Poughkeepsie.*

Because the decisions of the Supreme Court preclude resort to a court of admiralty in a case like the present, we hold that the libellant's claim in so far as it involves the imposition of a maritime lien, in favor of the libellant, upon the Tug John R. Williams should be dismissed and the decree against her vacated. But the claim against the respondent in personam, though not maintainable in admiralty, is good at law and may be asserted by the United States in the District Court where the action is pending. 28 U. S. C. A., Sec. 41 (1). It can make no difference that it was originally laid in admiralty. The only right which the respondent might have lost by having the case treated as one at common law was the right of trial by jury. But it laid no foundation for availing itself of that right by demanding such a trial in accordance with Rule 38. Consequently it can have no ground of complaint. *Prince Line v. American Paper Exports,* 55 F. (2d) 1053, 1056; *U. S. ex rel. Pressprich v. Elwell and Co.,* 250 F. 939, (C. C. A. 2); *Owens v. Breitung,* 270 F. 190, 193, (C. C. A. 2); *Cory Bros. v. United States,* 51 F. (2d) 1010, (C. C. A. 2).

For the above reasons the decree is modified by vacating it and dismissing the libel as against the Tug John R. Williams and her stipulators, and is otherwise affirmed without costs to either party in this court.

APPENDIX "B"
UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No.—— October Term, 1943.

(Motion argued February 4, 1944—Decided July 25, 1944.)

IN THE MATTER
of the
Petition of the United States of America for a writ of prohibition and/or a writ of mandamus, against the Honorable Mortimer W. Byers, Judge of the District Court of the United States for the Eastern District of New York, and all other judges and officers of said court.

THE BELL TELEPHONE COMPANY OF PENNSYLVANIA,

Libellant.

against

UNITED STATES OF AMERICA (as owner of S/S CAVALCADE),

Respondent.

Before:
L. HAND, AUGUSTUS N. HAND and FRANK,
Circuit Judges.

Petition by the United States of America for writs of prohibition and mandamus prohibiting Judge Mortimer

W. Byers of the United States District Court for the Eastern District of New York from taking any steps in certain suits in admiralty brought by the Bell Telephone Company of Pennsylvania against the United States, and by Eastern Telephone and Telegraph Company against the United States, and commanding him to vacate an order in each suit overruling the exceptions of the United States to the jurisdiction of the court and to enter an order in each suit declaring that the court is without jurisdiction thereof. Petitions denied.

AUGUSTUS N. HAND, *Circuit Judge*:

The Bell Telephone Company of Pennsylvania and Eastern Telephone and Telegraph Company filed separate libels in admiralty against the United States alleging that the Steamship Cavalcade, owned by the United States, while navigating in the Delaware River, negligently caused her anchor to come in contact with submarine telephone cables belonging to the companies, resulting in damage to the cables and requiring repairs and other expenses on the part of the owners of the cables to the amounts of $30,000 and $40,000 respectively. The respondent, the United States, filed exceptions to the libels on the ground that each failed to state a cause of action within the admiralty and maritime jurisdiction of the United States. Judge Byers, before whom the matters came on to be heard, made orders overruling the exceptions and sustaining the jurisdiction of the admiralty court. Thereupon the government filed a petition in this

court praying that a writ of prohibition issue prohibiting Judge Byers from any further exercise of jurisdiction in the above suits and that a writ of mandamus issue requiring him to vacate the orders overruling the exceptions to the jurisdiction and to enter an order in each suit declaring the court to be without jurisdiction thereof.

In our opinion in *United States v. Tug John R. Williams and Great Lakes Dredge and Dock Company*, which is filed herewith, we have held the District Court without jurisdiction in admiralty where the United States sued to recover damages from a tug and its owner to a submarine cable belonging to the government and connecting Fort Hamilton, New York, and Fort Wadsworth, Staten Island. The cable was installed for the army in order to furnish telephonic communication between the two forts and lay upon the bottom of the bay. In view of the allegations in the libels filed in the suits before Judge Byers it is hard to see how jurisdiction in admiralty can exist if our decision in *United States v. Tug John R. Williams and Great Lakes Dredge and Dock Company* is right, and why the libels here involved will not have to be dismissed. If, because of that decision, jurisdiction in admiralty shall be found not to exist the claims set forth in the pleadings cannot be asserted against the United States in the District Court, since under the Suits in Admiralty Act claims against it can be brought only if there would have been jurisdiction in admiralty had the vessel been privately owned or operated. 46 U. S. C. A. Section 742. If not, they can only be asserted in the Court of Claims.

In spite of the fact that the libellants are likely to fail in the suits before Judge Byers, we think the issues should be left for decision by the District Court and for review in due course on appeal, and not disposed of on applications for writs of prohibition and mandamus.

The question of admiralty jurisdiction is a close one and there have been great differences of opinion in regard to it among the judges of the District Courts as our decision in *United States v. Tug John R. Williams and Great Lakes Dredge and Dock Company* points out. We can hardly know what shape these suits or the proofs which may be offered will take until more has been done than file separate libels and interpose exceptions to the formal pleadings. It is possible that before the suits can be disposed of in the District Court our decision in *United States v. The Tug John R. Williams and Great Lakes Dredge and Dock Company* may be reversed by the Supreme Court. While the issue of the writs prayed for is within our discretion, *Roche v. Evaporated Milk Ass'n*, 310 U. S. 21, 27, it is evident from the latter decision that they should be granted sparingly and with reluctance.

The government relies on *Ex parte Peru*, 318 U. S. 578. There a vessel owned by the Republic of Peru was unlawfully libelled when its immunity from seizure had been recognized by the State Department. The situation was of such public importance and international significance that the Supreme Court necessarily held that a petition for a writ of prohibition ought to be entertained. The considerations involved were very different from

those in the case at bar where nothing more than governmental convenience is presented as an excuse for applying for the writs in order to cut short a few ordinary law suits in which the issues may be determined. If our decision in the other litigation we have referred to should be reversed by the Supreme Court not even convenience would be obtained.

Petitions denied.